No. 76-1231

In the Supreme Court of the United States

OCTOBER TERM, 1976

LOVELADIES PROPERTY OWNERS ASSOCIATION, INC., ETC., ET AL., PETITIONERS

v.

MAX RAAB, UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The court of appeals entered no opinion. The opinions of the district court are unreported (Pet. App. A, pp. 1a-10a and App. A, *infra*, pp. 1a-8a).

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1976 (Pet. App. B, p. 11a). The petition for a writ of certiorari was filed on March 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The correct jurisdictional provision is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, is an implied grant of jurisdiction to review agency action.

2. Whether the district court properly determined that jurisdiction pursuant to the mandamus statute, 28 U.S.C. 1361, was inappropriate.

STATEMENT

The facts are set forth in detail in the initial opinion of the district court (Pet. App. A, pp. 2a-3a).

In November 1972, personnel of the United States Army Corps of Engineers observed filling operations being conducted along the Atlantic coastline in Long Beach Township, Ocean County, New Jersey. An investigation indicated that the property was owned by the respondent Max Raab and that he had no authorization from the Corps of Engineers to conduct the filling operations.

The Corps of Engineers directed Raab to cease the filling operations and to apply to it for a permit. Raab submitted an application for a permit. After further review of the area and of Raab's filling operations, however, the Corps of Engineers determined that the area involved was not within the regulatory jurisdiction of the Corps of Engineers and, therefore, that no permit was required.

Petitioners, three associations of taxpayers and property owners in the Long Beach Island area, then instituted a civil action in the United States District Court for the District of New Jersey against Raab and the United States of America. They sought an injunction against further filling by Raab on his property; a declaratory judgment that the federal government had jurisdiction over the property on which the filling operations had been conducted; and an order

requiring Raab to file an application for a permit with the Environmental Protection Agency, requiring that Agency to order Raab to file an application with it, and requiring the Corps of Engineers and the Environmental Protection Agency to rule on the merits of Raab's applications. Jurisdiction was based upon the Rivers and Harbors Act of 1899, 30 Stat. 1151, as amended, 33 U.S.C. 401 *et seq.* (1899 Act), and the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, as amended, 33 U.S.C. (Supp. V) 1251 *et seq.* (FWPCA Amendments).

The district court dismissed the complaint for lack of jurisdiction and failure to state a claim upon which relief could be granted (Pet. App. A, pp. 1a-10a). The court stated that the 1899 Act provided no basis for jurisdiction because it contained no express authorization of private civil actions (*id.* at 8a). The court held that, because petitioners had not complied with the sixty-day notice requirement of the citizen suit provision of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1365, the FWPCA Amendments did not confer jurisdiction (*id.* at 6a-7a). The court also ruled that neither the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* and 701 *et seq.*, nor the federal mandamus statute, 28 U.S.C. 1361, provided jurisdiction. It held that the former did not create an independent jurisdictional basis for suits challenging government agency actions and that the latter was inapposite because an adequate alternative remedy existed under the citizen suit provision of the FWPCA Amendments (*id.* at 9a-10a).

In a subsequent opinion, the district court clarified its decision by stating that, while the petitioners' 1899 Act claims were dismissed with prejudice, the claims arising under the FWPCA Amendments were dismissed without prejudice (App. A, *infra*, pp. 1a-8a; final order, App. B, *infra*, pp. 9a-10a). The United States Court of Appeals for the Third Circuit affirmed the judgment

of the district court without opinion (Pet. App. B, p. 11a).

ARGUMENT

The court of appeals correctly affirmed the dismissal of the complaint. The Administrative Procedure Act does not create an independent jurisdictional basis for a suit challenging federal agency actions. *Califano* v. *Sanders*, No. 75-1443, decided February 23, 1977.

The district court correctly determined that the mandamus statute, 28 U.S.C. 1361, did not provide a basis for relief. For mandamus to issue, plaintiffs must show that an agency or its officers are under a clear affirmative duty that is "devoid of the exercise of judgment or discretion." *Clackamas County, Oregon* v. *McKay*, 219 F. 2d 479, 489 (C.A. D.C.); *Richardson* v. *United States*, 465 F. 2d 844, 849 (C.A. 3), reversed on other grounds, 418 U.S. 166; *United States* v. *Walker*, 409 F. 2d 477 (C.A. 9). Petitioners did not make such allegations.

Moreover, mandamus is not available when an alternative adequate remedy exists. *Ex parte Republic of Peru*, 318 U.S. 578, 584; *Richardson* v. *United States*, *supra*. The district court dismissed the present action without prejudice insofar as it was based on the citizen suit provision of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1365, because petitioners had not complied with the sixty-day notice requirement, and stated: "[Petitioners] obviously have an alternative adequate remedy—that is, an action under the 'citizen suits' provisions of the FWPCAA." Pet. App. A, p. 9a. Further review of that decision is not warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1977.

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CHAMBERS OF
GEORGE H. BARLOW
JUDGE

FEDERAL BUILDING
TRENTON, NEW JERSEY 08605

February 2nd, 1976.

NOT FOR PUBLICATION

FILED
February 3, 1976
At 4:30 p.m.
ANGELO W. LOCASCIO
Clerk

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RE: LOVELADIES PROPERTY OWNERS ASSOCIATION, INC., a corporation of the State of New Jersey; JOINT COUNCIL OF TAXPAYERS ASSOCIATIONS

OF SOUTHERN OCEAN COUNTY, INC., a corporation of the State of New Jersey; and LONG BEACH ISLAND CONSERVATION SOCIETY, INC., a corporation of the State of New Jersey v. MAX RAAB, UNITED STATES ARMY CORPS OF ENGINEERS, COL. A. SELLECK, JR., District Engineer, Philadelphia District, United States Army Corps of Engineers, BG JAMES L. KELLY, Division Engineer, North Atlantic Division, United States Army Corps of Engineers, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and GERALD M. HANSLER, Regional Director, Region II, United States Environmental Protection Agency. (Civil Action No. 74-1549)

OPINION

Gentlemen:

This case arises out of certain land-filling operations conducted by Max L. Raab on property located near Barnegat Bay in Long Beach Township, New Jersey. The facts and procedural background of the case are adequately set forth in this Court's opinion of November 24th, 1975. In that opinion, the Court held that plaintiffs' action must be dismissed. The case currently is before the Court on defendants' motion to settle the form of an order of dismissal. The parties have been unable to agree on whether the dismissal should be "with prejudice" or "without prejudice".

Our view is that the action must be dismissed without prejudice insofar as it arises under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251, *et seq.* This conclusion necessarily follows from the reasoning of our opinion. Therein, at page 6, we stated: "[plaintiffs'] challenge to Raab's filling operations must

be dismissed for failure to comply with the procedural requirements of the [FWPCAA's] 'citizen suits' provision. 33 U.S.C. §1365". We went on to say: "Where Congress provides a statutory method for obtaining review of administrative decisions, that method must be strictly adhered to . . . . The plaintiffs' failure to do so here compels the Court to dismiss their action under the FWPCAA." This language indicates clearly that our opinion rested on procedural grounds, and did not purport to reach the merits of plaintiffs' FWPCAA claim. Accordingly, that basis for dismissal was not intended to result in a dismissal with prejudice. Professor Moore has stated the applicable principles:

> "[O]rdinarily a judgment dismissing an action or otherwise denying relief for want of jurisdiction, venue, or related reasons does not preclude a subsequent action in a court of competent jurisdiction on the merits of the cause of action originally involved." [1B Moore's Federal Practice para. O.405[5], at p. 659.]

> "It has been pointed out that a final termination of an action short of a determination of the merits—as upon a sustained plea of lack of jurisdiction or improper venue—is judicially conclusive, in a subsequent suit, as to the precise matters adjudged, but will not bar a second suit between the parties or their privies on the same cause of action unless those issues are again decisive, and even if the prior judgment necessitates a dismissal of the second action, the cause of action is "still not barred by res judicata until there is a final determination on the merits. And 'merits' means 'the real or substantial grounds of action or defense as distinguished from matters of practice,

> procedure, jurisdiction or form.' " [1B Moore's Federal Practice para. 0.409[1], at p. 1003 (footnotes omitted).]

See *Smith v. Pittsburgh Gage and Supply Co.*, 464 F. 2d 870, 874 (3rd Cir. 1972); *Etten* v. *Lovell Manufacturing Co.*, 225 F. 2d 844, 846 (3d Cir. 1955), *cert. denied*, 350 U.S. 966 (1956).

The defendants insist, however, that even if we had reached the merits of the FWPCAA claim, we would have been compelled to rule that the plaintiffs were not entitled to relief. To engage in such an inquiry now, on a motion to settle the form of an order of dismissal, is most unusual, and would appear to be tantamount to the sort of advisory decision-making prohibited by Article 3 of the Constitution. Cf. *Pacific Intermountain Express Co. v. Hawaii Plastics Corp.*, No. 75-1445 (3d Cir. January 9, 1976). In any event, we are not convinced that the grounds pressed by the defendants would indeed bar plaintiffs from ultimately prevailing on the merits of this case (should the jurisdictional defects be surmounted). We will briefly set forth our difficulties with the defendants' various arguments.

Initially, the federal government defendants (various agencies and employees) insist that the FWPCAA action is *res judicata* as to them because of the dismissal by consent of a previous action brought by the plaintiffs against the United States. See n. 1 of our opinion of November 24th, 1975. This dismissal occurred after the United States had filed a motion urging a number of grounds for dismissal, including some which went to the merits of the FWPCAA claim. The dismissal order, however, specifies no particular ground for dismissal. "And when a number of grounds for dismissal are urged, an order of the court simply that the cause be dismissed, without an indication of the ground

upon which the court acted, cannot be res judicata as to any of the grounds for such order." 1B Moore's Federal Practice para. 0.409[1], at p. 1009. See *Scrofani v. Miami Rare Bird Farm*, 208 F. 2d 461, 464 (5th Cir. 1953). Thus, plaintiffs' FWPCAA claim probably is not barred by the *res judicata* doctrine.

Next, the defendants argue that Raab's filling activities already have been completed and that there is nothing the Environmental Protection Agency (EPA) can do about it now. However, we are aware of no provision of the FWPCAA which limits the EPA's enforcement jurisdiction to cases where the polluting activity is ongoing rather than completed. Section 309 of the FWPCAA, 33 U.S.C. §1319, which is the principal enforcement provision, empowers the Administrator of EPA to issue orders requiring violators to comply with the Act. In the present case, it presumably is possible for the EPA to order Mr. Raab to apply for a permit for his filling activities,[1] and, if such a permit is denied, to order him to take some action to restore the environmental quality of the area. Cf. *United States v. Holland*, 373 F. Supp. 665, 676-7 (M.D. Fla. 1974).

The defendants next suggest that the FWPCAA permits citizen suits against the Administrator of EPA only where the Adminstrator is alleged to have failed to perform a non-discretionary duty. 33 U.S.C. §1365(a)(2). But in the present case it may easily be argued that the Administrator has failed to perform a non-discretionary duty. Section 309

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[1]Section 404 of the FWPCAA, 33 U.S.C. §1344, empowers the Secretary of the Army, acting through the Chief of Engineers, to issue permits allowing the discharge of fill materials into navigable waters. As our previous opinion indicates, at p. 2, the Army apparently has a procedure for obtaining "after-the-fact" permits.

(3) of the FWPCAA, 33 U.S. §1319(3), provides that, whenever the Administrator determines from the facts available to him that an unlawful act has occurred, he "*shall* issue an order requiring such person to comply . . .. or he *shall* bring a civil action . . . ." (emphasis added). This statutory scheme admits of no discretion in a situation like the present case—where, accepting plaintiffs' factual averments as true, there would appear to be a clear violation of the FWPCAA. See 33 U.S.C. §1311; *United States v. Holland, supra.*

Finally, the defendants contend that polluting activities occurring before July 1st, 1973, are not cognizable in a citizen suit. See 33 U.S.C. §1365(f). Here, the alleged polluting activities occurred between October and December, 1972. However, the language of the citizen suits provision indicates that the July 1st limitation may only apply to actions brought pursuant to 33 U.S.C. §1365(a)(1), and not to actions brought pursuant to 33 U.S.C. §1365(a)(2) (actions against the Administrator). While our attention has been directed to a paragraph in a Senate Report which suggests a contrary interpretation, see 2 U.S. Code Congressional and Administrative News 3668, 3747 (92d Cong., 2d Sess., 1972), we are reluctant to accept this interpretation without a more complete analysis of the legislative history—especially since the language of 33

U.S.C. §1365[2] itself does not appear to support the Senate Report's comments.[3]

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[2]Section 1365(a) provides as follows:

> "(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title."

Section 1365(f) provides, in relevant part:

> "(f) For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; . . ."

While this July 1st, 1973, effective date clearly applies to actions brought under 33 U.S.C. §1365(a)(1), it is not so clear to us that the July 1st date also applies to actions against the Administrator pursuant to §1365(a)(2)—which, unlike §1365(a)(1), contains no reference to "an effluent standard or limitation".

[3]The Senate Report states:

> "As pointed out, the Committee bill would provide in the citizen suit provision that actions will lie against the Administrator for failure [to] exercise his duties under the Act, including his enforcement duties. Authority granted to citizens to bring enforcement actions under this section is limited to effluent standards or limitations established administratively under the Act. Such

Accordingly, an order will be entered dismissing plaintiffs' FWPCAA claim without prejudice.[4] In so doing, we emphasize that our views here are not intended to preclude the defendants from raising as defenses in subsequent litigation any of the matters discussed herein. We discussed these matters only to indicate that, contrary to defendants' suggestion, the lack of merit in plaintiffs' FWPCAA claim is not so self-evident as to warrant a dismissal of that claim with prejudice.

Very truly yours,

George H. Barlow
United States District Judge

GHB/ebj

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standards or limitation are defined in subsection (f) of Section 505 to include the enforcement of an unlawful discharge under section 301(a), effective after July 1, 1973. By limiting the effective date of citizens suits for violation of this provision the Committee believes sufficient time is available for the State and Federal governments to develop fully, and execute the authority contained in section 402."

[4] There is no dispute that the plaintiffs' complaint under the Rivers and Harbors Act of 1899, 33 U.S.C. §401, *et seq.*, must be dismissed *with* prejudice. In our opinion of November 24th, 1975, we held that the Rivers and Harbors Act was not enforceable through private civil actions.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 74-1549

LOVELADIES PROPERTY OWNERS ASSOCIATION, INC., a corporation of the State of New Jersey; JOINT COUNCIL OF TAXPAYERS ASSOCIATIONS OF SOUTHERN OCEAN COUNTY, INC., a corporation of the State of New Jersey; and LONG BEACH ISLAND CONSERVATION SOCIETY, INC., a corporation of the State of New Jersey, Plaintiffs,

v.

MAX RAAB, UNITED STATES ARMY CORPS OF ENGINEERS, COL. C. A. SELLECK, JR., District Engineer, Philadelphia District, United States Army Corps of Engineers, BG JAMES L. KELLY, Division Engineer, North Atlantic Division, United States Corps of Engineers, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and GERALD M. HANSLER, Regional Director, Region II, United States Environmental Protection Agency, Defendants.

ORDER

In accordance with the Court's opinion of November 24th, 1975, and with the Court's opinion filed this date in the above-entitled matter, IT IS HEREBY ORDERED that this action is dismissed without prejudice insofar as it arises under the Federal Water Pollution Control Act Amendments of 1972, and with prejudce insofar as it arises under the Rivers and Harbors Act of 1899.

It is further ORDERED that plaintiffs' motion for summary judgment is denied. No costs.

George H. Barlow
United States District Judge

Dated: February 3rd. 1976.

FILED
February 3. 1976
At 4:30 p.m.
ANGELO W. LOCASCIO
Clerk